Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1477

FAST MOTOR SERVICE, INC., *Appellant*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

and

NATIONAL FREIGHT, INC., *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois Eastern Division

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MOTION TO AFFIRM OF NATIONAL FREIGHT, INC.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Appellee, National Freight, Inc. moves, pursuant to your Honorable Court's Rule 16 to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 25, 1975, on the bases that the questions presented were

properly reviewed by the Court below and are so insubstantial as to not warrant plenary review by your Honorable Court.

QUESTION PRESENTED

Did the Court below appropriately and correctly analyze the criteria for the issuance of a Permit consistent with Part II of the Interstate Commerce Act, 49 U.S.C., 309(b)?

Appellant in no manner has shown that either the Interstate Commerce Commission or the Court below incorrectly applied the criteria established by the Congress in the above-cited section of the Interstate Commerce Act.

STATEMENT OF THE CASE

On or about February 16, 1971, Appellant, Fast Motor Service, Inc., filed an application with the Interstate Commerce Commission docketed at MC 126276, Sub-No. 46, wherein it sought *contract carrier* operating authority, over *irregular routes,* in the transportation of:

> *Containers, container ends, closures and accessories, paper and paper articles, and plastic articles and materials, equipment and supplies* used in the manufacture, distribution and sale of the foregoing specified commodities (except commodities in bulk or those which because of size or weight require the use of special equipment), between points in Colorado, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Indiana, Ohio, Michigan, West Virginia, Massachusetts, Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut, Vermont, New Hampshire, Rhode Island, Maine, and the District of Columbia, under contract with Continental Can Co., Inc.

The matter was duly heard by the Interstate Commerce Commission and National Freight, Inc. and others appeared in opposition, presented evidence and filed Briefs in opposition. Administrative Law Judge Margulies, by Report and Order served July 14, 1972, recommended denial of the application, which action was sustained, after Exceptions by Appellant and Replies by other parties, by Order served November 22, 1972. A subsequent Petition for Reconsideration and an additional Petition for Further Hearing by Appellant, to which Replies were filed, resulted in an Order, served April 5, 1973, denying Appellant's Petitions and sustaining the prior denial of the application.

Appellant then filed its Appeal with the United States District Court for the Northern District of Illinois, Eastern Division, which, by Opinion filed March 25, 1975, sustained the Interstate Commerce Commission.

ARGUMENT

In Appellant's application before the Interstate Commerce Commission, it proposes a contract carrier service utilizing 40 tractors and 40 extra-high-cube capacity trailers so as to provide service for Continental Can Company between its 82 plants and its customers throughout a 23-State area, plus the District of Columbia (J.S. App. A, 29(a)). The shipper acknowledged that within its eastern region embracing 43 plants (J.S. App. A, 7(a)), it had sufficient extra-high-cube van trailers for movement within the eastern region via Appellee National Freight, Inc., and sufficient service in the transportation of other materials and equipment and supplies (J.S. App. A, 14(a)). There were no details presented as to how, where and to

what extent the operation would be actually used (J.S. App. A, 29(a), 30(a)).

Factual details concerning Appellant and those protesting the case and the evidence of the supporting shipper, were reviewed in detail (J.S. App. A, 4(a)-27(a)).

The Administrative Law Judge then considered the five statutory criteria established by Congress in Section 309(b) of Part II of the Interstate Commerce Act (49 U.S.C. 309(b)), which in pertinent part, reads as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

As to these criteria, the Administrative Law Judge found, and concluded as follows:

1. The number of shippers to be served by Applicant—the Appellant fulfilled the first of these criteria, in that it would serve only three shippers (J.S. App. A, 28(a)).

2. The nature of service proposed—the record here was considered fatally defective (J.S. App. A, 29(a)-31(a)).

3. The effect which granting the permit would have upon the services of protesting carriers—the Administrative Law Judge found that other carriers would be

adversely affected (J.S. App. A, 31(a)), which in the case of Appellee National Freight, Inc., is sustained by his finding of substantial traffic handled within the eastern region and its fear of losing that traffic (J.S. App. A, 16(a)).

4. The effect which denying the permit would have upon the Applicant and/or shipper—it was found that denial would not adversely affect Appellant or its supporting shipper (J.S. App. A, 31(a)).

5. The changing character of the shipper's requirements—it was here found that these requirements were not marked by such change as would make this element a significant factor (J.S. App. A, 32(a)).

The Court below likewise considered each of these criteria, reviewed the conclusions of the Administrative Law Judge with respect thereto and likewise found Appellant's case to be wanting (J.S. App. D, 43(a)-46(a)). A dissenting opinion reached a contrary conclusion and would have modified the Order of the Interstate Commerce Commission by approval of the application.

Appellant should take no comfort from the dissent for it has been held that Orders of the Interstate Commerce Commission should not be set aside or modified by a Court on review even though the Court might reach a different conclusion on the facts presented if the Orders are within the scope of the Commission's statutory authority, are based upon appropriate findings and are supported by substantial evidence. See *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-536; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139; *Virginia Ry. Co.* v. *United States*, 272 U.S. 658, 663-666; *Illinois Central Railroad*

Co. et al v. *Norfolk & Western Railway Co. et al,* 385 U.S. 57, 87 S.Ct. 255, 17 L.Ed.2d 162 (1966).

The Court below found that there was substantial evidence to support the decision of the Interstate Commerce Commission and the statutory criteria had been properly met. In such circumstance, there is no substantial federal question for determination. Appellant seeks to have your Honorable Court substitute its conclusion for that of the Interstate Commerce Commission on the basic facts presented, which have twice been construed against it.

CONCLUSION

The decision of the District Court affirming the action of the Interstate Commerce Commission, is clearly supported by substantial evidence and is correct as a matter of law. It is, therefore, prayed that the Motion to Affirm be granted.

Respectfully submitted,

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